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Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-303

NEW HAMPSHIRE BANKERS ASSOCIATION,
MERCHANTS NATIONAL BANK,
AMOSKEAG TRUST COMPANY,
INDIAN HEAD NATIONAL BANK,
BANK OF NEW HAMPSHIRE, N.A.,
KEENE NATIONAL BANK,
STRAFFORD NATIONAL BANK
and the
EXETER BANKING COMPANY,

Plaintiffs,

vs.

JAMES W. NELSON, Bank Commissioner for the State of New Hampshire, and
WARREN B. RUDMAN, Attorney General for the State of New Hampshire,

Defendants.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR DEFENDANTS IN OPPOSITION

OPINIONS BELOW

The opinions of the courts below are as follows:

New Hampshire Bankers Association, et al v. *James W. Nelson, et al*, ___ F.2d ___, #72-1049, (1st Cir., 1972); *New Hampshire Bankers Association, et al* v. *James W. Nelson, et al*, 336 F. Supp. 1330 (D.N.H., 1972).

ARGUMENT

I. ISSUANCE OF THE WRIT SHOULD BE DENIED BECAUSE THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH ANY DECISIONS OF THE SUPREME COURT OR ANY OTHER COURT OF APPEALS, OR WITH ANY APPLICABLE STATE LAW.

Initially, it is obvious that the decision of the Court of Appeals does not conflict with any state law applicable to the subject matter of the decision. The decision upheld a state statute, N.H. RSA 390:13, and there are no conflicting state decisions relative to the subject matter.

Secondly, there are no conflicting Court of Appeals decisions on the same subject matter. None have been cited by Plaintiffs, simply because the New Hampshire statute is unique. *Complaint,* ¶16; *Stipulation,* ¶1.

Plaintiffs attempt to show that the decision conflicts with decisions of the Supreme Court, and cite *McCulloch* v. *State of Maryland,* 4 Wheat. 316, 4 L. Ed. 579 (1819) and *Franklin National Bank of Franklin Square* v. *New York,* 347 U.S. 373, 74 S. Ct. 550 (1954) in support of that argument. *Petition for Writ of Certiorari,* p. 5.

A close reading of the decision appealed from, the opinion of the District Court below, and the cases cited by Plaintiffs compels a conclusion that there is no conflict in substance, and that Plaintiffs' argument on the issue is without foundation.

Franklin National was a case of clear state discrimination against national banks. The New York statute, §258 (1) of the Banking Law, prohibited all banks other than New York chartered savings banks from using the word "savings" in bank advertising or doing any other thing related thereto. *Franklin National Bank of Franklin Square* v. *New York,* 347 U.S. 373, 374, 74 S. Ct. 550, 552, 98 L. Ed. 767, 772 (1954). The fatal defect in the statute was that it placed the national banks at a competitive disadvantage to certain state banks in a facet of their business as authorized by Congress.

Plaintiffs rely on broad dictum in the *Franklin National* opinion relating to the right to advertise, and the conclusion stemming therefrom that advertising is an implied or incidental power within the meaning of 12 U.S.C. §24 seventh. This dictum is not sufficient to support Plaintiffs' contention of conflict, because unlike the statute at issue in *Franklin National*, 12 U.S.C. §371, which makes only the interest rate paid on savings deposits subject to nondiscriminatory state law, 12 U.S.C. §92a (a) and (b) place the entire spectrum of trust powers under applicable nondiscriminatory state law. In substance, as the Court of Appeals noted, 12 U.S.C. §92a is like the statutes referred to in Footnote 7 to the *Franklin National* opinion, 347 U.S. at 378. If, assuming Justice Jackson's dictum is correct, advertising is an incidental power, then 12 U.S.C. §92a (a) and (b) make that power, along with the underlying trust powers, subject to state law. See *Investment Company Institute* v. *Camp, Comptroller*, 274 F. Supp. 624, 640 (D.D.C., 1967); rev'd on other grounds, 420 F.2d 624 (D.C.Cir., 1968); Dist. Ct. Aff'd 401 U.S. 617 (1970).

II. THE DECISION DOES NOT RAISE AN IMPORTANT ISSUE OF FEDERAL LAW AND HAS NO SIGNIFICANT IMPACT. THERE WAS NO DEPARTURE FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS.

The issues involved in the case are peculiar to New Hampshire. What was litigated was a New Hampshire statute regulating one activity of New Hampshire domiciled banks advertising their executor services. In an attempt to show a broader impact, Plaintiffs now cite Washington R.C.W. 30.04260 and argue that the decision will somehow affect activities in the State of Washington. The Plaintiffs, however, stipulated earlier:

> "1. The State of New Hampshire is the only state in the United States which clearly prohibits banks from advertising their capacity to act as executors. The State of Washington has an ambiguous statute which *some banks interpret* to restrict their right to so advertise; *however, many banks in Washington do advertise their capacity to serve as executors.*" Stipulation, ¶1. (Emphasis added)

A close look at R.C.W. 30.04260 compels the conclusion that it is not analogous to N.H. RSA 390:13. Moreover, we have not found that the Washington statute has ever been challenged; and, as stipulated by Plaintiffs, it does not as a matter of fact prohibit advertising.

Plaintiffs also argue that the decision of the Court of Appeals will foster a flurry of new restrictive state legislation. The argument amounts to fanciful speculation. If it does in fact have that result, and if, as a result, there are court decisions conflicting with the decision in the present case, then perhaps the matter might be a bit more ripe for review. At present, however, the speculation of Plaintiffs is insufficient ground upon which to base a writ of certiorari.

Finally, Plaintiffs do not allege, and the record does not indicate, that the Court departed from the usual course of judicial proceedings, nor did anything of an extraordinary procedural nature.

III. THE DECISION OF THE COURT OF APPEALS IS CLEARLY CORRECT.

As discussed in Section I of this brief, the supremacy clause issue raised by Plaintiffs is based on an erroneous reading of *Franklin National Bank* v. *New York*, 347 U.S. 373 (1954), and ignores the clear language of 12 U.S.C. §92a. Both the District Court and the Court of Appeals recognized this, and the decision of the Court on the issue is clearly not open to question.

Similarly, there is no apparent error in the decision of the Court of Appeals on the due process and equal protection issues. The Court of Appeals upheld the finding of the District Court that RSA 390:13 did not create invidious discrimination, was not arbitrary, nor clearly unfair. 336 F. Supp. 1330, 1340 (D.N.H., 1972).

The District Court in its long and analytical opinion, applied to the facts the reasoning of *Ferguson* v. *Skrupa*, 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963). Plaintiffs do not argue that *Ferguson* v. *Skrupa* is not viable, or that this Court has abandoned it in economic regulation cases. There is, finally,

nothing to indicate that the Courts below applied its reasoning in an erroneous manner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari to the Court of Appeals for the First Circuit should be denied.

Respectfully submitted,

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